Developments

United Kingdom: The "war on terror," U.K.-style—The detention and deportation of suspected terrorists

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Detention without trial and deportation of suspected terrorists—compatibility with European Convention on Human Rights—whether deportations are rendered lawful by entry into "no torture" agreements with destination states

The "war on terror" has been a dominant and recurrent theme within political and legal discourse in the United Kingdom, as in many other countries, throughout the current decade. How best to protect the people and institutions of a liberal democracy against those willing to pursue by violent means their opposition to the founding norms of such a state is an age-old question. A particularly important strand within the debate

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this question invites concerns the extent to which it is acceptable to compromise liberal democratic values in order, paradoxically, to protect them. These are questions that have had to be confronted in the U.K., in recent years, as it has sought to respond to the terrorist threat evidenced, inter alia, by the attacks that took place in several locations in the United States on September 11, 2001, and in London on July 7, 2005. This paper is concerned with two recent cases—the decisions of the House of Lords[1] in *RB (Algeria) v. Home Secretary*[2] and of the European Court of Human Rights (ECtHR) in *A v. UK*[3]—arising from two inhibitions under which the British government has found or placed itself in relation to its prosecution of the so-called war on terror.

The first of those inhibitions stems from the U.K. government's general reluctance to deal with suspected terrorists via the regular criminal justice system. Its position is that it is rarely possible to prosecute such individuals because intercept evidence cannot[4] and should not[5] be used in criminal proceedings as this would risk compromising intelligence sources.[6] This makes the circumstances in which suspected terrorists can be charged with criminal offenses much narrower than they might be otherwise, and the government has felt it necessary to look for means other than incarceration following conviction by which to contain the threat perceived to be posed by such individuals.

Second, the British government's counterterrorism strategy during the last decade has been influenced, significantly, by its perception that an important element of the terrorist threat emanates from foreign nationals. Often unable or unwilling, for the reason given above, to prosecute such individuals, the government's policy has been to seek to deport them. However, as interpreted by the ECtHR, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[7] which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,"[8] is often a significant obstacle to the deportation of suspected terrorists. In *Soering v. United Kingdom*, the applicant successfully argued that it would be unlawful for the British government to order his extradition to Virginia, in the United States, because there he would face trial for murder and, if convicted, risked being sentenced to death and thus exposed to the "death row phenomenon."[9]

1 When the *RB* case was decided, the Appellate Committee of the House of Lords was, for most purposes, the U.K.'s court of final appeal. *Cf.* note 64 *infra*.

2 (2009) UKHL 10, (2009) 2 W.L.R. 512.

3 (2009) ECHR 3455/05, (2009) 26 BHRC 1.

4 Regulation of Investigatory Powers Act 2003, s.17.

5 *See, e.g.*, the arguments submitted by (inter alia) the UK in Ramzy v. The Netherlands (Application No. 25424/05) (admissibility decision), para. 126.

6 A recent government-commissioned review found that even if it was lawful to use intercept evidence in criminal proceedings, it would actually be used in terrorism cases only rarely because disproportionate damage to national security would be occasioned thereby. Privy Council Review of Intercept as Evidence, 2008, Cm. 7324, at para. 58.

7 More commonly referred to, and cited subsequently in this paper, as the European Convention on Human Rights or ECHR.

8 For the purposes of concision, the expression "ill-treatment" will be used in this paper to refer to the range of practices proscribed by article 3, except where it is necessary to distinguish between the proscribed practices.

9 (1989) 11 EHRR 439.

Taking into account the personal circumstances of the applicant, the Court held that the length of time for and the conditions in which he would likely be held raised a "real risk of treatment going beyond the threshold set by Article 3."[10] The Court, in the later case of *Chahal v. United Kingdom*, explained that deportation is prohibited by article 3 "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country."[11]

The difficulty perceived by the British government is that many of the individuals it suspects of being involved in plotting or carrying out acts of terrorism in the U.K. originate from precisely the sort of countries to which deportation is forbidden under article 3. Caught, as it sees it, between a rock and a hard place, the British government has successively relied upon two devices to attempt to neutralize the perceived threat to the U.K. posed by individuals who are suspected of being terrorists but who, for the reasons given above, cannot be put on trial for a criminal offense and who would, in the normal course of events, face a real risk of torture or inhuman or degrading treatment if deported to their home country.

1. Indefinite detention without charge or trial

The more radical of those devices was the Anti-terrorism, Crime and Security Act 2001. Enacted in the immediate aftermath of 9/11, it has been described as "the most draconian legislation [the U.K.] Parliament has passed in peacetime in over a century."[12] Of particular note is part 4 of the act, which provided for indefinite detention, without charge or trial, of any person whose presence in the U.K. was reasonably believed by the executive branch to be a risk to national security, and who was reasonably suspected, again by the executive branch, of being a terrorist.[13] This regime applied only to foreign nationals who could not be deported.[14] Thus it amounted to a device designed to permit, within the constraints of the *Soering*/*Chahal* principle, the containment of the threat that such individuals were deemed to pose.

Yet the detention-without-trial system provided for in the 2001 act was clearly inconsistent with article 5 ECHR, which provides that deprivation of liberty is permissible only in limited circumstances—circumstances that, it has been held, do not extend to the sort of open-ended detention for security purposes that was allowed under the 2001 Act.[15] However, article 5, unlike article 3, can be derogated from by

[10] *Id.* at para. 111.

[11] (1997) 23 EHRR 413, para. 74.

[12] Adam Tomkins, *Legislating Against Terror: The Anti-terrorism, Crime and Security Act 2001*, 2002 Pub. L. 205, 205.

[13] Anti-terrorism, Crime and Security Act 2001, §§ 21–23 (no longer in force). Suspects were free to leave the U.K. if they wished, but there were rarely "safe" third countries willing to accept them.

[14] *Id.* at § 23.

[15] A v. Sec'y of State for the Home Dep't, (2004) UKHL 56, (2005) 2 A.C. 68, para. 9. For comment, see Mark Elliott, *Detention Without Trial and the 'War on Terror'*, 4 Int'l J. Const. L. (I•CON) 553 (2006).

states parties to the ECHR if the conditions laid down in article 15 are satisfied. Those conditions are that there must be a "war or other public emergency threatening the life of the nation" and that the extent of any derogation from the ECHR must be no greater than that which is "strictly required by the exigencies of the situation."[16] The U.K., citing the terrorist threat evidenced by the 9/11 attacks, entered a derogation under article 15 in an attempt to reconcile the regime contained in the 2001 act with its international obligations under the ECHR. It fell to the Grand Chamber of the ECtHR in *A v. UK* to determine whether the derogation satisfied the conditions laid down in article 15.

The first question for the ECtHR was whether the risk of terrorist attack constituted a war or public emergency threatening the life of the nation. When this matter was considered by the U.K.'s court of final appeal, only one judge, Lord Hoffmann, refused to accept the government's argument that such an emergency existed. He took a robust view of the sort of threat that would amount to one imperiling "the life of the nation," arguing that the latter concept is not "coterminous with the lives of [the] people."[17] The threat of a terrorist attack that would kill large numbers of people did not per se amount to evidence of a public emergency for article 15 purposes; only the prospect of an attack of such a magnitude as to threaten "our institutions of government or our existence as a civil community" would be sufficient.[18]

This view was not shared by the ECtHR (just as it had not been shared by Lord Hoffmann's British colleagues).[19] This is unsurprising. The ECtHR prefaced the relevant part of its judgment with a reminder that its usual approach, in such cases, involved recognition of the fact that, "By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities."[20] The ECtHR went on to note that it had "in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman."[21] The Court refused to disagree with the House of Lords' conclusion that the U.K. government had been entitled to think that there was a public emergency threatening the life of the nation.

The ECtHR then had to determine whether the steps taken by the U.K.—that is, the introduction of indefinite detention of foreign suspects without charge or trial—were "strictly required by the exigencies of the situation." Like the majority in the House of

[16] Article 15 further stipulates that the derogating measures adopted by the state must not be inconsistent with any of its other obligations under international law.

[17] *Supra* note 15 , at para. 91.

[18] *Id.* at para. 96.

[19] *Supra* note 3 , at para. 181.

[20] *Id.* at para. 173.

[21] *Id.* at para. 179.

Lords, it held that they were not. This conclusion is, at least prima facie, noteworthy, bearing in mind that the ECtHR's usual tendency is to find that derogating measures, in fact, are strictly required and hence legitimate under article 15. That tendency is attributable to the fact that the margin-of-appreciation doctrine, set out above, has often operated in article 15 cases in such an extreme way as to amount to "almost ostentatious deference to government discretion,"[22] which all but eviscerates judicial review.[23] There are several reasons why this might be so.[24] One possibility is that the Court, conscious that submission to its jurisdiction is ultimately voluntary in the sense that it depends on states remaining parties to the ECHR, may seek to avoid presenting states with a choice between remaining party to the convention and pursuing what are perceived to be vital national interests. A more likely explanation is that the sort of justifications normally invoked by states in article 15 cases raise precisely the sort of issues—in particular, national security[25]—over which many courts, not just the ECtHR, are often reluctant to exercise close scrutiny. The reasons for such reluctance are evaluated below.

Against that background, the ECtHR's willingness in *A v. UK* to hold that the measures adopted by the U.K. were not strictly necessary, such that the derogation under article 15 was invalid, looks highly significant. However, the basis of the ECtHR's decision was subtler than has been hitherto indicated. Rather than deciding for itself (as it usually would), albeit subject to any margin of appreciation, whether the measures in question complied with the relevant requirements of the convention—here, those contained in article 15—the Court said that it felt "it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention, unless it can be shown that the national court misinterpreted the Convention or the Court's case-law or reached a conclusion which was manifestly unreasonable."[26] Such an approach was, said the ECtHR, appropriate because "the domestic courts are part of the 'national authorities' to which the Court affords a wide margin of appreciation under Article 15."[27] Applying those principles, the ECtHR upheld the House of Lords' decision, which had been reached on the basis, inter alia, that the British government's acknowledgment that it had not been necessary to detain British suspected terrorists meant that it could not be argued, persuasively, that it was necessary to detain foreign—but otherwise identically situated—suspects.[28] This prompts two comments.

[22] Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights,* 15 Oxford J.L. Stud. 69, 75, 79 (1995).

[23] *See, in particular*, Brannigan v. United Kingdom, (1994) 17 EHRR 539.

[24] *See* Marks, *supra* note 22 .

[25] The ECtHR held in Leander v. Sweden, (1987) 9 EHRR 433 that a wide margin of appreciation was appropriate in a case in which national security interests were at stake.

[26] *Supra* note 3 at para. 182.

[27] *Supra* note 3 at para. 174.

[28] *Cf.* Elliott, *supra* note 15.

First, the House of Lords' decision was a striking one because, in a break with traditional U.K. jurisprudence, it was willing—the national security context notwithstanding—carefully to scrutinize the government's justifications for the measures that had been adopted. However, to suppose that *A v. UK* evidences a willingness on the part of the ECtHR closely to scrutinize states' purported justifications for derogating from convention norms would be to adopt a simplistic reading of the case. To the extent that the Court's approach was more robust than is usual in such cases, such robustness was largely parasitic upon the approach adopted by the House of Lords.

Second, this, in turn, raises important questions about the nature of the margin-of-appreciation doctrine and the relationship between the Strasbourg Court and national courts. The standard justification for the margin of appreciation is that the "national authorities" are better placed than the ECtHR, as an international court, to determine whether there is an emergency and, if so, whether the measures adopted in response to it are strictly necessary.[29] There are, broadly speaking, two factors that the ECtHR might regard as placing it in a weaker position than national authorities in relation to such matters.

On one level, the margin-of-appreciation doctrine appears to presuppose that the Court is under a practical inhibition; being distant from the state concerned, the international judge is not as well situated as the state's own authorities to make fine judgments about how risks should be balanced. However, this thinking, which represents the standard rationalization of the margin-of-appreciation doctrine, in fact conflates two distinct matters. It is relatively uncontroversial that *courts* appropriately might defer (or attach particular respect) to the views of the *legislative or executive branches* in relation to matters that fall peculiarly within the expertise of the latter. This is simply a reflection of the distinct competencies of the different branches, and of the limitations of the judicial process. However, the margin-of-appreciation doctrine, by emphasizing the *international* nature of the Strasbourg Court and the *national* nature of the authorities to which deference is due, brings into play a subtly different set of considerations based on what has been called the "cultural distance" that may exist between the Court and the states parties.[30] While that might be a relevant consideration in certain circumstances—for example, in relation to the question whether restricting the availability of certain types of pornography might be justified by reference to public morality, the latter being a culturally sensitive phenomenon[31]—its relevance, if any, to the sort of issue at stake in *A v. UK* is far from clear.

The second inhibition upon which judicial deference to executive and legislative judgments (and hence the margin of appreciation) might be founded is a normative one, the force of which, it must be acknowledged, is contestable. It holds that decisions

[29] For critical discussion of the margin-of-appreciation doctrine, see Jones, *The Devaluation of Human Rights Under the European Convention*, 1995 Pub. L. 430.

[30] John Laws, *The Limitations of Human Rights*, 1998 Pub. L. 254, 258.

[31] Handyside v. United Kingdom, (1979–80) 1 EHRR 737.

about how to manage risks, such as those posed by the threat of terrorism, have "serious potential results for the community" and, therefore, "require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process."[32]

It is not immediately clear how the views on the margin of appreciation expressed by the ECtHR in *A v. UK*—that domestic courts are part of the national authorities to which deference is due—relate to either limb of the rationale for the doctrine. It is not (at least it is not in the U.K.) the role of national courts to make fine judgments about how, for example, the risk of a terrorist attack should be balanced against the liberty of suspected terrorists. It is for the executive and legislative branches to exercise a primary judgment in relation to such matters, and the role of the court is then to determine, applying relevant domestic principles of deference, whether that primary judgment is within the bounds of legality. It is not obvious, therefore, that it is appropriate for the ECtHR to defer to the view of a national court. That national court itself may have deferred to a considerable extent already to the views of the legislative or executive branch. If the ECtHR is to defer to national courts' views that may themselves have been formed on the basis of deference to the political branches' views, the Strasbourg Court's role risks evaporating almost entirely. Even more problematic is the relationship between the ECtHR's view of the margin of appreciation in *A v.UK* and the normative limb of that doctrine's underlying justification. Even if that aspect of the justification is thought to be convincing—that is, if it is thought that arguments of democratic legitimacy require judges to defer to the political branches in relation to such matters as national security—it is self-evident that it is premised upon the different forms of legitimacy enjoyed by the courts and the others branches. It is, therefore, difficult to see why it might require or render appropriate deference by one court to the views of another court.

The willingness of the ECtHR in *A v. UK* to regard domestic courts as a constituent element of the national authorities, to which respect is due under the margin-of-appreciation doctrine, operated benignly—at least from the perspective of those who regard robust judicial review of derogations from human rights norms positively. Indeed, it resulted, as explained above, in an approach notably more robust than is the norm when article 15 cases are heard in Strasbourg. However, that is the case only because the domestic judgment to which Strasbourg deferred was itself (at least on the question of whether the measures adopted were strictly necessary) an interventionist one. Nonetheless, it is self-evident that the margin-of-appreciation doctrine, as conceived in *A v. UK*, would produce very different results if the national court had adopted a highly deferential, though still not unreasonable, approach to a legislative or executive decision to override human rights norms. It remains to be seen whether the ECtHR will apply the *A v. UK* conception

[32] Sec'y of State for the Home Dep't v. Rehman, (2001) UKHL 47, (2003) 1 A.C. 153, para. 62.

of the margin of appreciation under those circumstances—there have been, after all, occasions on which the ECtHR has taken national courts to task for failing to review human rights infractions with sufficient rigor.[33] However, if the position is, as *A v. UK* suggests, that national courts' determinations in article 15 cases need only be reasonable, it follows that the extent of the "European supervision" that accompanies the margin of appreciation in such cases is potentially very modest indeed.[34]

2. Deportation subject to "no torture" agreements

Long before *A v. UK* was decided in Strasbourg, the U.K. Parliament, in light of the House of Lords' judgment in that case, repealed the detention-without-trial provisions in the Anti-terrorism, Crime and Security Act 2001, and alternative strategies were pursued in order to contain the perceived threat from suspected terrorists against whom the government was unwilling or unable to lay criminal charges. One of those strategies[35] was to negotiate "no torture" agreements with countries to which the U.K. government wished to deport foreign suspects. The intention was that such agreements would render lawful those deportations that might otherwise be precluded by article 3 as interpreted in *Soering* and *Chahal*. The adoption of such a strategy raises an important question about the extent to which human rights guarantees applicable *within* a state should provide individuals with protection against deportation *to* a state in which such rights may not be respected.

One aspect of that question is whether rights that are regarded as absolute in a purely domestic context may be diluted, or qualified, in situations involving removal to a third state. The extent, if any, to which such dilution is acceptable is a normative question to which there is no objectively correct answer. What is clear, however, is that taken too far, the dilution of rights in removal cases risks substantially undermining the absolute nature of the right as it applies domestically. For example, if national security could justify, straightforwardly, deportation to countries in which torture may or would be used, ECHR states might seek, in effect, to contract out to such states' security services the interrogation of suspected terrorists. States parties to the ECHR would be able to circumvent their own incapacity, lawfully, to

[33] *See, e.g.*, Smith v. United Kingdom, (2000) 29 EHRR 493, paras. 129–139.

[34] *Supra* note 3 at para. 179.

[35] The other was the introduction of "control orders" under the Prevention of Terrorism Act 2005 allowing the executive, subject to judicial supervision, to restrict the liberty of suspected terrorists (whether British or foreign) by placing them, for example, under curfew. The assets of certain suspected terrorists were also frozen pursuant to UN Security Council resolutions, although one of the litigants in the *A v. UK* and *RB* cases recently successfully argued before the Court of First Instance of the European Communities that the way in which the resolution had been implemented in the European Union was invalid because it entailed a breach of, inter alia, his rights of due process under EU law. Case T-318/01, Othman v. European Council, 2009 All ER (D) 99.

engage in torture by having other countries to carry out torture on their behalf.[36] Questions arise about the extent to which the right not to be tortured, or indeed any other right, is to be regarded not only as a restriction upon states parties' legal capacity to behave inconsistently with the right themselves but also as a legal inhibition upon their removal of individuals to third countries in which such behavior might occur.

As we have already seen, the position adopted by the ECtHR is that removal to a third country is impermissible if there is a real risk of the individual's being treated contrary to article 3. This criterion conceals a value judgment. Not all risks of ill-treatment will prevent deportation; only *real* risks will have such an effect—a distinction that implies the Court is prepared to countenance a degree of offsetting of the individual's interest in not being ill-treated against the state's interest in removing non-nationals from its territory.[37] Subject to that point, however, the *Soering/Chahal* principle remains an absolute bar to deportation. As the ECtHR recently confirmed in *Saadi v. Italy*, once a real risk of ill-treatment has been established, the existence of strong public policy reasons in favor of expulsion will not render it lawful.[38] Yet there are two subtler ways in which the state's latitude may be enhanced in deportation cases:[39] by de facto raising the level of risk that must be established before deportation is rendered unlawful; and, alternatively or in addition, by requiring that risk be related to treatment whose severity crosses a higher threshold than that which obtains in domestic cases. Both of these matters were of relevance in the *RB* case, to which we now turn.

RB concerned three individuals—one Jordanian and two Algerians—whom the U.K. wished to deport on security grounds to their countries of nationality. Recognizing that this might otherwise contravene article 3, the U.K. government entered into agreements with its Jordanian and Algerian counterparts to the effect that the individuals concerned would not be subjected to torture or to inhuman or degrading treatment if deported. The question for the House of Lords was whether those

[36] This is not a far-fetched example given the furor over extraordinary rendition: see the website of the U.K. Parliament's All-Party Group on Extraordinary Rendition, *at* http://www.extraordinaryrendition.org. Of course, it would probably be unlawful to use the evidence thereby gathered in ECHR states' courts, though such evidence might serve other useful purposes. See, in the U.K. context, A v. Sec'y of State for the Home Dep't (No. 2), (2005) UKHL 71, (2006) 2 A.C. 221.

[37] Such thinking is, perhaps, implicit in Soering v. United Kingdom, (1989) 11 EHRR 439, para. 110. The ECtHR appeared to be influenced by the fact that if the applicant was not deported to the U.S., he could instead be tried in Germany. Arguably implying that its assessment of the legality of deportation to the U.S. might have been different had trial in Germany not been a possibility, the Court said that the latter possibility was a "circumstance of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case." Much was made of this by the House of Lords in *Wellington*, below n 40, although the ECtHR clearly affirmed in Saadi v. Italy, (2008) 24 BHRC 123, para. 138, that it is "not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion."

[38] Saadi v. Italy, (2008) 24 BHRC 123.

[39] A further way of enhancing states' latitude—requiring the real risk of ill-treatment to be established on a higher than usual standard of proof—was rejected in Saadi v. Italy, (2008) 24 BHRC 123.

agreements were sufficient to enable the appellants to be deported consistently with the U.K.'s obligations to them under article 3 ECHR. It is clear, in principle, that assurances on the part of the proposed destination state can make lawful a removal to it that would otherwise fall foul of article 3. This is unsurprising. If, as we have seen, the position is that expulsion can be reconciled with article 3, provided that no real risk of ill-treatment arises, then the extent of any such risk must be considered in light of all the relevant circumstances. Provided that they are not wholly incredible, those circumstances will include any statements issued by the destination state about how the person concerned would be treated upon removal to it. For example, in *Wellington*, the House of Lords held that the claimant could lawfully be deported to the state of Missouri, in the U.S., to stand trial for, among other things, first-degree murder.[40] Although the death penalty could be imposed in such cases in Missouri, assurances were given by the prosecuting authority that it would not seek such a penalty. The credibility of those assurances was such that the theoretical availability of the death penalty raised no relevant risk of ill-treatment and, therefore, did not constitute an obstacle to deportation.

The House of Lords was equally satisfied in *RB* that the assurances provided by the Algerian and Jordanian governments were sufficient to establish the absence of a real risk that the individuals concerned would suffer torture or inhuman or degrading treatment upon their return.[41] Deportation, therefore, was not precluded by the *Soering*/*Chahal* principle. This is a surprising and significant conclusion for several reasons. First, as the ECtHR has recognized, the extent to which reliance, reasonably, can be placed on a promise must, in part, depend on the credibility of the government that issues it.[42] A promise to behave in a way that is inconsistent with the government's established pattern of past practice is, clearly, all other things being equal, less likely to be honored than one that is consistent with such practice. The reliability of a promise is especially questionable, the ECtHR has said, if, as in the case of Algeria, the state has a track record of refusing access to international observers.[43] Indeed, the Court has specifically said that "diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."[44] It is obviously relevant, against that background, to note that Algeria and Jordan have lamentable human

[40] R (Wellington) v. Sec'y of State for the Home Dep't, (2008) UKHL 72, (2009) 1 A.C. 335.

[41] The role of the House of Lords on appeal was to determine whether the first instance decision was lawful and rational.

[42] Ryabikin v. Russia, (2009) 48 EHRR 55, para. 121.

[43] *Id.* The UN Special Rapporteur on Torture has been trying to visit Algeria since 1997.

[44] *Id.* at para. 122.

rights records, not least with respect to torture.[45] Second, any doubts about the credibility of assurances might be assuaged by agreement, on the part of the governments concerned, to rigorous external monitoring of compliance.[46] Algeria refused to allow external monitoring of the treatment of returned individuals; however, the House of Lords did not regard this as essential, holding that consular contact would be sufficient, notwithstanding that Algeria refused to allow such contact during any periods of detention, which is surely when deportees would be most vulnerable to torture. Third, one of the appellants had already been tortured in Jordan and had successfully claimed asylum in the U.K. in the light of that ill-treatment.

In spite of the cumulative effect of these points, the House of Lords was prepared to accept that the assurances given by the Algerian and Jordanian governments were sufficient to render the proposed deportations consistent with article 3. This suggests that the *Soering/Chahal* principle, at least as applied in *RB*, constitutes a relatively modest fetter upon states' capacity to remove foreign nationals. While the House of Lords formally applied *Soering/Chahal* by accepting that deportation would be unlawful if there was a real risk of ill-treatment, the outcome in *RB* suggests that it is willing to be satisfied surprisingly easily that, on the facts, no such risk arises. This amounts in practice to the setting of a notably high threshold level of risk that must be crossed before expulsion is barred, thereby enhancing the state's capacity to remove foreign nationals.

The other important way in which that capacity may be enhanced is to hold that, whatever the relevant level of risk, it must relate to a particularly severe form of treatment and, certainly, to a form of treatment that is more extreme than that which would trigger a breach of rights in the expelling state. Stephanie Palmer rightly points out that it is widely accepted that the severity of ill-treatment necessary to trigger article 3 is context-dependent; for example, forcible medical treatment may not constitute ill-treatment if therapeutically required.[47] Nonetheless, the ECtHR has made it clear that article 3 remains an absolute right in the sense that, once ill-treatment crosses the relevant threshold, it cannot be justified by public policy.[48] However, that distinction becomes difficult to maintain if courts are prepared to countenance public

[45] In its 2008 report on Algeria, Amnesty International said that the country's military intelligence agency "continued to detain alleged terrorism suspects incommunicado and in secret locations, often military barracks, where they were at risk of torture and other ill-treatment. Those detained included several Algerian nationals returned from other states." *Available at* http://www.amnesty.org/en/region/algeria/report-2008. In 2006, the UN Special Rapporteur on Torture visited Jordan and concluded that "the practice of torture is widespread in Jordan, and in some places routine" and that there existed "a system of total impunity that allows torture to be practised in Jordan unchecked." *Available at* http://daccessdds.un.org/doc/UNDOC/GEN/G07/101/07/PDF/G0710107.pdf?OpenElement. Evidence of this nature was given considerable weight in Saadi v. Italy, (2008) 24 BHRC 123.

[46] Although there would have to be sufficient confidence that the monitoring would actually be permitted.

[47] Herczegfalvy v. Austria, (1992) 15 EHRR 437, para. 82.

[48] Stephanie Palmer, *A Wrong Turning: Article 3 ECHR and Proportionality*, 2006 Cambridge L.J. 438.

policy as a relevant feature of the context within which the threshold for proscribed ill-treatment falls to be determined. In the *Wellington* case, mentioned above, it was argued that deportation to Missouri would be contrary to article 3 not only because of the possible use of the death penalty[49] but also because, in the absence of the use of that penalty, conviction for first-degree murder would automatically result in a sentence of life imprisonment with no possibility of parole—a situation that arguably constitutes not torture but inhuman or degrading treatment contrary to article 3. In fact, it was held that, because a remote possibility of release existed, no article 3 issue arose.

However, the point of present interest is that three of the five judges who decided the case were prepared to adopt a "relativist" approach to article 3, such that the meaning of "inhuman or degrading treatment" depended, in part, on the strength of the public policy reasons underling the removal decision.[50] The essence of their reasoning is that although public policy cannot justify deportation in the face of a real risk of inhuman or degrading treatment, public policy might, in the first place, justify a particularly strict reading of that criterion on the facts of the case.[51] As a result, compelling public policy reasons might mean that removal would be precluded only if there was a risk of a form of ill-treatment more severe than that which would otherwise trigger article 3.

It is clear from *RB* that a more radical form of the relativist approach applies in relation to other rights in cases of removal. The Jordanian appellant argued that his deportation would violate the right to a fair trial set out in article 6 ECHR. In that regard, the first instance court found as fact that, if returned, he would face a trial at which there was a real risk that evidence obtained via torture would be used against him. If the same principle had been applied to article 6 as is applicable to article 3, that would have been the end of the matter: the existence of a real risk of an unfair trial would have precluded the appellant's removal. However, it was held that, where rights other than article 3 are involved, deportation will only be unlawful if it can be shown that there is a real risk of a state of affairs *in the destination state* that goes well beyond that which would constitute a breach of the relevant right *in the expelling state*. The precise test that applies in such cases has been the subject of some uncertainty in the ECtHR and the U.K. courts. However, it is now reasonably clear that the question in an article 6 case is whether there is a real risk of "a breach of the principles of fair trial . . . which is so fundamental as to amount to a nullification, or destruction of the

[49] An argument which, we have seen, failed in light of the prosecuting authority's assurances that the death penalty would not be sought.

[50] *Supra* note 40 , at paras. 25–26 (L. Hoffmann) & 57 (L. Carswell). Baroness Hale identified herself with Lord Hoffmann's view. *Id.* at para. 48.

[51] There is some support for this view in N v. United Kingdom, (2008) 47 EHRR 39, para. 44 (in holding that deportation of an AIDS sufferer to a country in which she was likely to die due to inadequate health care did not trigger article 3, the ECtHR said that convention is premised on the need to strike "a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.").

very essence, of the right."[52] This has also been referred to as a requirement of a real risk of a "flagrant breach of the relevant right."[53]

As with raising the level of risk that must be established before removal is precluded, the flagrant-breach test raises important questions about the extent to which human rights law, and the ECHR, in particular, should constrain states' capacity to remove non-nationals. It has been noted that the U.K., like other ECHR states, "has no general mandate to impose its own values on other countries who do not share them";[54] and, as the ECtHR has pointed out, pragmatism dictates that "it cannot be required that an expelling contracting state only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention."[55] Thus, it is clear that in the absence of a flagrant-breach requirement, states' ability to remove foreign nationals would be heavily compromised. It would be impossible to remove non-nationals to countries in which, for example, freedom of expression or freedom of religion fell below the standards required in ECHR states. Large swathes of the world would thereby be placed off-limits.

It is unsurprising, therefore, that the ECtHR has avoided interpreting the convention in this way, bearing in mind the importance that is generally attached in international law to the ability of states, as an aspect of state sovereignty, to control who, other than nationals, may enter and remain in their territory. It has been necessary, as a result, to strike a balance between states' and individuals' interests in removal cases. The ECtHR has done this both by clarifying the scope of convention rights themselves—for example, it held that deporting an AIDS sufferer to a country in which she was likely to die due to inadequate health care would not entail ill-treatment for article 3 purposes[56]—and, in particular, by emphasizing the need for a real risk of a *flagrant* breach in the destination state. Thus, a gay man could be deported to Iran notwithstanding that local law prohibited adult consensual homosexual activity. While such a prohibition in an ECHR state would be contrary to the right to respect for private life,[57] such a prohibition in the destination state did not constitute a destruction of the very essence of the right.[58] Similarly, Christians could be deported to Pakistan notwithstanding that they feared attack by Muslim extremists; such circumstances disclosed no real risk of a flagrant breach of the right to freedom of religion. A high threshold was necessary in such cases, said the Court: "Otherwise it would be imposing an obligation on contracting states effectively to act as indirect guarantors of freedom of worship for the rest of the world."[59]

[52] Mamatkulov & Askarov v. Turkey, (2005) 41 EHRR 25, para. O-III14 (joint partly dissenting opinion of Bratza, Bonello, & Hedigan, JJ.).

[53] R (Ullah) v. Special Adjudicator, (2004) 2 A.C. 323, 337 (L. Bingham).

[54] EM (Lebanon) v. Sec'y of State for the Home Dep't, (2008) UKHL 64, (2008) 3 WLR 931, para. 42.

[55] F v. United Kingdom (Application No. 17341/03, June 22, 2004).

[56] N v. United Kingdom (2008) 47 EHRR 39, para. 44.

[57] Dudgeon v. United Kingdom, (1982) 4 EHRR 149.

[58] Z & T v. United Kingdom, (Application No. 27034/05, Feb. 28, 2006).

[59] *Id.*

Although, against this background, it was always clear that the Jordanian appellant in *RB* faced an uphill struggle, the circumstances of his case were striking. The first instance court found as fact that there was a very real risk that the confessions in question were obtained by treatment that breached article 3; that any challenge in Jordan to using the confessions, most probably, would not succeed; that, if used, the confessions likely would be of decisive importance in the trial; and that, if convicted, the appellant would be sentenced to life imprisonment.[60] The Court of Appeal[61] held that these circumstances meant there was a real risk of a flagrant denial of justice. In doing so, it was influenced by the fact that the focus of concern related to the procurement of evidence through torture, the prohibition of which, it was said, was a "fundamental, unconditional and non-derogable [one] that stands at the centre of the Convention protections."[62] In other words, trials conducted on the basis of evidence extracted under torture were so unfair as to represent an attack on the very essence of the right to a fair trial—and the existence of a real risk that the appellant could be subjected to such a trial was, therefore, in the Court of Appeal's view, a bar to deportation.

The House of Lords disagreed. While not ruling out the possibility that a trial involving evidence extracted under torture could amount to a flagrant denial of a fair trial, it could not be said that the likelihood of such a trial in the appellant's case was high enough to satisfy that test. Since there is no explicit authority from the European Court, it is not clear that the convention has to be interpreted as preventing individuals who are regarded as a threat to national security from being condemned to life imprisonment at the hands of a legal regime in which the use of evidence extracted under torture is at least a real risk. However, what is clear is that, as with its decision on the article 3 limb of *RB*, while the House of Lords formally applied the ECtHR jurisprudence, in its application of it to the facts it set a high threshold that must be crossed by individuals seeking to resist removal.

In the course of his judgment, Lord Hope enthusiastically endorsed the principle that ECHR states must secure to *everyone* within their jurisdiction the rights set out in the convention, such that "aliens" and nationals must be protected alike, without discrimination and however "dangerous," "despicable" or "disgusting" they might be.[63] It is self-evident that, unless the sovereign right of states to expel foreign nationals is rendered largely nugatory, that principle must, to some extent, yield in the context of removal cases. However, the approach of the House of Lords in *RB*, both to the capacity of assurances to remove a real risk of ill-treatment and to the question of what constitutes a flagrant denial of a fair trial, has undeniably emphasized that sovereign right, with obvious consequences for the capacity of foreign nationals to resist removal

[60] *Supra* note 2 , at paras. 142 & 149.
[61] (2008) EWCA Civ 290, (2008) 3 W.L.R. 798.
[62] *Id.* at para. 48.
[63] RB (Algeria) v. Home Sec'y, (2009) UKHL 10, (2009) 2 W.L.R. 512, para. 210.

into circumstances falling below—indeed, well below—the minimum human rights standards applicable throughout Europe. In terms of the balance *RB* strikes between the state's freedom to pursue its conception of the national interest and the protection of individual rights, it thus stands in sharp contrast to the House of Lords' trailblazing decision that prefigured and, as we have seen, profoundly influenced the ECtHR's judgment in *A v. UK*.

It is to be hoped that, as the United Kingdom's newly created Supreme Court starts work, it will look to the latter, not the former, decision of the now-defunct Appellate Committee of the House of Lords as its lodestar when required—as it surely will be—to address the extent to which human rights norms circumscribe the government's freedom to fight the war on terror as it sees fit.[64] Regrettably, a series of recent human rights cases in the House of Lords, of which *RB* is a notable example, suggests that the radicalism seen in *A* was exceptional rather than evidence of a new judicial boldness in this sphere.[65] Human rights law is at its most valuable when it stands between the interests of the majority and those of unpopular minorities—of which there can be few better examples than foreign nationals suspected of involvement in terrorism. Such cases constitute the acid test of the commitment of a state, including that of its courts, to fundamental rights.

[64] The judicial functions of the House of Lords were abolished and transferred to the Supreme Court of the United Kingdom in October 2009.

[65] R (Al-Jedda) v. Sec'y of State for Defence, (2007) UKHL 58, (2008) 1 A.C. 332; R (Gillan) v. Comm'r of Police of the Metropolis, (2006) UKHL 12, (2006) 2 A.C. 307; Austin v. Comm'r of Police of the Metropolis, (2009) UKHL 5, (2009) 1 A.C. 564.